Supreme Court, U.S.
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In The

Supreme Court of the United States

MITCHELL N. KAY and
LAW OFFICES OF MITCHELL N. KAY, P.C.,

Petitioners,

v.

JOSE GONZALEZ,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a debt collection letter that fulfills the disclaimer language under Second Circuit precedent violates the Fair Debt Collection Practices Act (the "FDCPA"), 15 U.S.C. § 1692e, as a matter of law.

2. Whether the application of the appropriate FDCPA consumer standard, i.e., the "least sophisticated consumer" or the "unsophisticated consumer," to the language of a debt collection letter is a question for the trier of fact or is an issue of law for a court.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners state that the parties to the proceeding are listed in the caption. Petitioners also make this corporate disclosure statement pursuant to Supreme Court Rule 29.6. This is Petitioners' original Corporate Disclosure Statement.

(1) Petitioner Law Offices of Mitchell N. Kay, P.C. has no parent corporation.

(2) No publicly-held corporation owns 10 percent or more of the stock of Petitioner Law Offices of Mitchell N. Kay, P.C.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 577 F.3d 600, and is reprinted as Appendix A. The Fifth Circuit's opinion reverses a judgment of the United States District Court for the Southern District of Texas, Houston Division, which did not select its opinion for publication in the Federal Reporter. The district court's opinion is reprinted as Appendix B.

JURISDICTION

The Fifth Circuit Court of Appeals filed its decision on August 3, 2009. This petition is filed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provision is 15 U.S.C. § 1692e. This section of the Fair Debt Collection Practices Act (the "FDCPA" or the "Act") is too lengthy to

be reproduced verbatim in this Petition, and is reprinted as Appendix C.

STATEMENT OF THE CASE

Never before has a simple collection letter created such far reaching legal import. Relying on precedent from the United States Court of Appeals for the Second Circuit, Petitioners, who reside and/or are domiciled in New York, attempted to collect a debt from Respondent via a collection letter containing a Second Circuit approved disclaimer informing Respondent that "[a]t this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account."[1] Under the standards set forth by the Second Circuit, this collection letter did not violate the Fair Debt Collection Practices Act (the "FDCPA"). Predictably, Petitioners believed a well-reasoned and established opinion would govern collection efforts in Texas, as well.

The Fifth Circuit, however, chose to hoe its own road and, in doing so, has created a circuit split – a split that affects debt collectors, law firms, corporations, banks, credit card companies, utility companies, and local municipalities in the United States because there no longer is a uniform application of the FDCPA that these entities can rely upon.

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[1] *See Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360 (2d Cir. 2005).

The saga of this collection letter – now enmeshed in legal limbo – began on or about November 21, 2007, when Petitioners sent Respondent a collection letter (the "Collection Letter") seeking to collect a debt for US Asset Management, Inc. The Collection Letter was not signed and did not contain terms such as "clients," "representation," "remedies," or any other legal jargon suggesting lawyer involvement other than the law firm's name, as required by the FDCPA.[2] The Collection Letter set forth that the account in question was "being handled by this office," but contained the exact disclaimer language regarding attorney review approved by the Second Circuit in *Greco*: "[a]t this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account."

Respondent commenced this action in the United States District Court for the Southern District of Texas, Houston Division, alleging that Petitioners violated § 1692e(3) and (10) of the FDCPA.[3] The district court had jurisdiction over the matter pursuant to 28 U.S.C. § 1331. The district court dismissed Respondent's lawsuit for his failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), deciding the Collection Letter was not deceptive as a matter of law.[4] The district court based its determination, in part, on the attorney review disclaimer approved by the Second Circuit.[5]

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[2] *See* 15 U.S.C. § 1692e(14).

[3] 15 U.S.C. § 1692e(3); (10).

[4] *See* Appendix 30; 35.

[5] *See* Appendix 33-35.

In reversing the district court's decision, the Fifth Circuit acknowledged that the disclaimer language contained in the Collection Letter was the identical disclaimer language in the Second Circuit found dispositive in the *Greco* case.[6] The Fifth Circuit, however, did not follow the Second Circuit's lead and hold that the Collection Letter was not deceptive as a matter of law. Instead the Fifth Circuit created a "different but amorphous standard" in evaluating debt collection letters.[7]

This new amorphous standard sets forth three categories for a debt collection letter: (1) those that violate the FDCPA as a matter of law; (2) those that do not violate the FDCPA as a matter of law; and (3) those that fall somewhere "[i]n the middle" and, therefore, are a question for the trier of fact.[8] The Fifth Circuit remanded the case back to the district court for a jury trial on the issue of whether the "least sophisticated consumer" would be deceived into thinking that a lawyer was involved in the collection of Respondent's debt simply because the disclaimer language approved by the Second Circuit was contained on the back of the collection letter and not on the front.[9]

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[6] *See* Appendix 14.

[7] *See* Appendix 16 (dissenting opinion).

[8] *See* Appendix 12-13.

[9] *See* Appendix 15-16.

REASONS FOR GRANTING THE PETITION

The disclaimer language contained in the debt collection letters in *Greco* and here are identical: "at this time, no attorney with this firm has personally reviewed the particular circumstances of your account."[10] Both debt collection letters were sent by law firms on law firm letterhead.[11] Neither debt collection letter was signed by an individual attorney.[12] Both law firms were sued by the debtors who received the respective letters. Both lawsuits were dismissed pursuant to Rule 12 of the Federal Rules of Civil Procedure.[13] Both dismissals were appealed. The issue presented to the Fifth Circuit and the Second Circuit was identical: whether the debt collection letter in question violated the FDCPA as a matter of law. The outcomes should have been identical – like the disclaimer language – and now we come to this Court for review.

The Second Circuit determined that the debt collection letter did not violate the FDCPA as a matter of law.[14] In contrast, the Fifth Circuit created a new amorphous standard for evaluating debt collection letters – a standard that effectively has hamstrung every entity that attempts to legally collect debts in the United States. The Fifth Circuit's ruling

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[10] *See Greco*, 412 F.3d at 361; Appendix 4.

[11] *See Greco*, 412 F.3d at 361; Appendix 2.

[12] *See Greco*, 412 F.3d at 362; Appendix 2.

[13] *See Greco*, 412 F.3d at 361; Appendix 30; 35.

[14] *See Greco*, 412 F.3d at 363-65.

has thwarted the purpose behind the FDCPA and effectively abrogated the uniform application of this important federal statute. In this process, the Fifth Circuit has created a circuit split with respect to the standards for the deceptive nature of debt collection letters under the FDCPA, and widened the current circuit split as to whether the application of the "least sophisticated consumer" standard to the language of a debt collection letter is a question for the trier of fact or an issue of law for a court. Only this Court can resolve the current circuit splits, thereby serving the purpose behind the FDCPA and ensuring that this important federal statue affecting every person with outstanding debt is applied in a uniform and reliably consistent fashion.

I. THE COLLECTION LETTER IS NOT DECEPTIVE AS A MATTER OF LAW AND THE FIFTH CIRCUIT'S RULING TO THE CONTRARY CREATES A CIRCUIT SPLIT CONCERNING THE STANDARDS FOR DETERMINING THE DECEPTIVE NATURE OF DEBT COLLECTION LETTERS UNDER THE FDCPA

The beginning of any inquiry into the validity of a collection letter under the FDCPA starts with the standard by which a consumer is to be viewed. The circuit courts are split on this issue, with the majority opting for the "least sophisticated consumer"

standard.[15] The "least sophisticated consumer" standard is an "objective analysis that seeks to protect 'the naïve' from abusive practices, while simultaneously shielding debt collectors from liability for 'bizarre or idiosyncratic interpretations' of debt collection letters."[16] Even under this standard, "the least sophisticated consumer can be presumed to possess a rudimentary amount of information about the world and a willingness to read a collection notice with some care."[17]

A. The Second Circuit's Standard for Determining the Deceptive Nature of a Debt Collection Letter under the FDCPA

Using the "least sophisticated consumer" as its objective standard, the Second Circuit determined

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[15] *See Savino v. Computer Credit Inc.*, 164 F.3d 81, 85 (2d Cir. 1998); *Wilson v. Quadramed Co.*, 225 F.3d 350, 354 (3d Cir. 2000); *Swanson v. S. Oregon Credit Serv., Inc.*, 869 F.2d 1222, 1225 (9th Cir. 1989); *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1175 (11th Cir. 1985). A minority of the circuit courts have adopted the "unsophisticated consumer" standard, which protects uninformed, naïve, and/or trusting consumers, but admits an objective element of reasonableness. *See Gammon v. GC Servs. L.P.*, 27 F.3d 1254, 1257 (7th Cir. 1994); *Duffy v. Landberg*, 215 F.3d 871, 873 (8th Cir. 2000). The Fifth Circuit specifically has refused to adopt either standard noting that the difference between the two is "de minimis at most." *Peter v. GC Servs. L.P.*, 310 F.3d 344, 348 n.1 (5th Cir. 2002).

[16] *Greco*, 412 F.3d at 363.

[17] *Id.* (citing *Johnson v. NCB Collection Servs.*, 799 F. Supp. 1298, 1306-07 (D. Conn. 1992)).

that a debt collection letter from a law firm did not violate the FDCPA as a matter of law because it contained a disclaimer informing the debtor that "at this time, no attorney with this firm has personally reviewed the particular circumstances of your account."[18]

The Second Circuit specifically held that "[n]othing else in the letter confused or contravened this disclaimer of attorney involvement" even though the debt collection letter was sent on law firm letterhead; informed the debtor that the law firm represented financial institutions; and contained the law firm's name in the signature block.[19] Even the "least sophisticated consumer" – considered by some to be on the very last rung of the sophistication ladder[20] – upon reading a debt collection letter with such a disclaimer "must be taken to understand that no attorney ha[s] yet evaluated his or her case, or made recommendations regarding the validity of the creditor's claims."[21]

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[18] *Greco*, 412 F.3d at 360.

[19] *Id.* at 361, 365.

[20] *See Gammon*, 27 F.3d at 1257.

[21] *Greco*, 412 F.3d at 365.

B. The Fifth Circuit's Departure from the Second Circuit's well-reasoned and established Standard

Under the standard enunciated by the Second Circuit in *Greco*, the Collection Letter presented to the Fifth Circuit does not violate the FDCPA because it contains a clear and conspicuous disclaimer informing even the "least sophisticated consumer" that no attorney was involved in the evaluation of the debt.[22] The Fifth Circuit, however, departed from the Second Circuit's well-reasoned and established opinion concerning the effect of an attorney involvement disclaimer on the deceptive nature of a debt collection letter under the FDCPA. In splitting with the Second Circuit, the Fifth Circuit determined that the Collection Letter was neither deceptive as a matter of law nor not deceptive as a matter of law even though it contained the identical disclaimer language evaluated by the Second Circuit in *Greco*.[23] Instead, because the Collection Letter fell somewhere in the middle, the

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[22] The Collection Letter does not violate the FDCPA whether it is evaluated using the "least sophisticated consumer" standard or the "unsophisticated consumer" standard. The Fifth Circuit, in refusing to choose between the two, recognized that the "least sophisticated consumer" standard is a "more demanding standard than asking whether a reasonable consumer would be confused." *See Peter*, 310 F.3d at 348 n.1. Even applying the "more demanding standard," the Second Circuit determined that even the "least sophisticated consumer" would understand that any attorney had not reviewed his account to date. *Greco*, 412 F.3d at 365.

[23] *See* Appendix 14-15.

Fifth Circuit determined the deceptive nature of the Collection Letter is a question for the trier of fact.[24]

In failing to follow the Second Circuit's lead, the Fifth Circuit has created a circuit split on the standards for determining the deceptive nature of a debt collection letter under the FDCPA. In the Second Circuit, the disclaimer "at this time, no attorney with this firm has personally reviewed the particular circumstances of your account" reasonably explains to the "least sophisticated consumer" that no attorney has reviewed the account. As such, any debt collection letter containing the disclaimer does not violate the FDCPA as a matter of law.[25] In stark contrast, according to the Fifth Circuit, it is now up to a jury to decide whether such a disclaimer puts a consumer on notice of an attorney's involvement, or lack thereof, in the collection of a debt.

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[24] *See* Appendix 15-16; 16 (dissenting opinion). Coincidentally, this holding widened a preexisting circuit split regarding whether the deceptive nature of a debt collection letter is a question for the trier of fact or an issue of law for a court. *See* Appendix 22-23 (dissenting opinion). This matter will be addressed in more detail below.

[25] Petitioners recognize that a debt collection letter containing such a disclaimer could violate the FDCPA for a myriad of other reasons. But under *Greco*, such a disclaimer prevents a violation of, at the very least, 15 U.S.C. § 1692e(3).

II. THE FIFTH CIRCUIT'S OPINION WIDENS THE CURRENT CIRCUIT SPLIT CONCERNING WHETHER THE APPLICATION OF THE "LEAST SOPHISTICATED CONSUMER" STANDARD TO THE LANGUAGE OF A DEBT COLLECTION LETTER IS A QUESTION FOR THE TRIER OF FACT OR AN ISSUE OF LAW FOR A COURT

In splitting from the Second Circuit on standards for determining the deceptive nature of a debt collection letter under the FDCPA, the Fifth Circuit widened the current circuit split regarding whether the application of the "least sophisticated consumer" standard to the language of a debt collection letter is a question for the trier of fact or an issue of law for a court.[26]

The Second Circuit, Third Circuit, and Ninth Circuit consider the application of the "least sophisticated consumer" standard to the language of a debt collection letter to be a question of law for a court.[27]

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[26] Petitioners recognize that there is a circuit split as to whether the "least sophisticated consumer" standard or the "unsophisticated consumer" standard is the appropriate standard by which a consumer is to be viewed for the purposes of the FDCPA. The "consumer standard" circuit split, however, has no bearing on whether the application of the appropriate standard – whichever it may be – is a question for the trier of fact or an issue of law for the court.

[27] *See Shapiro v. Dun & Bradstreet Receivable Mgmt. Servs., Inc.*, 59 F. App'x 406, 407-08 (2d Cir. 2003); *Wilson*, 225 F.3d at 353 n.2; *Terran v. Kaplan*, 109 F.3d 1428, 1432 (9th Cir. 1997). As the dissent pointed out, "[t]hese cases address whether the

(Continued on following page)

In support of its position that this is an issue of law for a court to decide, the Third Circuit noted that its decision was "buttressed by the rationale behind [its] *de novo* review standard for contracts and other written instruments, including collective bargaining agreements and trust agreements."[28]

In contrast, the Sixth Circuit, the Seventh Circuit, and now the Fifth Circuit consider the application of the standard to be a question of fact.[29] In reaching this conclusion, the Fifth Circuit noted that the Collection Letter presents a close call, and that reasonable minds can differ as to its deceptive nature.[30] The Seventh Circuit's reasoning was much more direct:

> The intended recipients of dunning letters are not federal judges, and judges are not experts in the knowledge and understanding of unsophisticated consumers facing demands by debt collectors. We are no more

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language in a debt collection letter overshadowed or contradicted the disclosures required under § 1692g." *See* Appendix 22 (dissenting opinion). Regardless, the question usually presented in a § 1692g case still involves the application of the "least sophisticated consumer" standard, albeit in a different context. As such, "the inquiry is the same: how will an unsophisticated consumer interpret the language of a debt collection letter." *See* Appendix 22 (dissenting opinion).

[28] *Terran*, 109 F.3d at 1433.

[29] *Kistner v. The Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433, 441 (6th Cir. 2008); *Johnson v. Revenue Mgmt. Corp.*, 169 F.3d 1057, 1060 (7th Cir. 1999).

[30] *See* Appendix 15.

> entitled to rely on our intuitions in this context than we are in deciding issues of consumer confusion in trademark cases, where the use of survey evidence is routine.[31]

There is a clear circuit split on this issue that only this Court can resolve.

III. THIS COURT SHOULD GRANT THIS WRIT OF CERTIORARI TO RESOLVE THE TWO CIRCUIT SPLITS BECAUSE BOTH SPLITS HAVE FAR REACHING IMPLICATIONS AS THE FDCPA AFFECTS EVERY BUSINESS AND INDIVIDUAL IN THE UNITED STATES

The FDCPA was enacted to eliminate abusive debt collection practices by debt collectors.[32] Debt collectors rely on the judicial opinions that interpret the boundaries under which they seek redress for creditor clients. These opinions craft what constitutes acceptable and non-deceptive practices. In no place is this more abundantly clear than from Petitioners' own reliance on the Second Circuit's opinion in *Greco* in drafting their debt collection letters. But debt collectors, such as Petitioners', attempt to collect debts throughout the United States. It defeats the purpose of a federal statute, such as the FDCPA, if Petitioners, and others similarly situated, have to

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[31] *Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 776 (7th Cir. 2007).

[32] 15 U.S.C. § 1692(e).

tailor their collection efforts in each circuit to ensure that they are in compliance with each circuit's interpretation, or in some cases, each jury's interpretation, of what constitutes "deceptive practices" under the FDCPA.

This lack of uniformity in the application of the FDCPA effectively has hamstrung every entity that attempts to collect debts in the United States and thwarts an important purpose behind the FDCPA – ensuring that debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged.[33] Debt collectors who want to ensure that they are in compliance with the FDCPA have competing standards that must be followed. What the Second Circuit deems acceptable, the Fifth Circuit deems unacceptable. What the Second Circuit, Third Circuit, and Ninth Circuit deem an issue of law, the Fifth Circuit, Sixth Circuit, and Seventh Circuit deem an issue of fact. The extra oversight in ensuring that every letter meets each circuit's standard undoubtedly places more constraints on debt collectors who comply with the FDCPA than those who fail to comply.

Uniformity in the application of a federal statute is always important, but it is especially so when faced with an issue involving the FDCPA. The FDCPA affects every debt collector in the United States and every client they collect debts on behalf of, including

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[33] *Id.*

corporations, banks, credit card companies, utility companies, and local municipalities. The FDCPA also affects every consumer who has an outstanding debt that has been placed in collection. The only way to ensure the uniform application of the FDCPA is for this Court to grant this Writ of Certiorari and resolve the current circuit splits so that debt collectors have a clear understanding of what is acceptable under the FDCPA and by what standard their collection efforts will be judged. Debt collectors should not be hamstrung from doing their job by complying with the FDCPA. This flies in the face of the clear purpose behind the statute.

CONCLUSION

The Court should grant the petition for a writ of certiorari in order to resolve the current circuit splits concerning the FDCPA.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOSE GONZALEZ,

Plaintiff-Appellant

v. No. 08-20544

MITCHELL N. KAY and LAW
OFFICES OF MITCHELL N. KAY, P.C.

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

Filed August 3, 2009

Before Jolly, Prado, and Southwick, Circuit Judges.

Prado, Circuit Judge:

Plaintiff-Appellant Jose Gonzalez ("Gonzalez") allegedly failed to pay his Sprint PCS Wireless cell phone bills, totaling $ 448.97. Sprint turned the consumer debt over to US Asset Management Services, Inc. ("US Asset"), which in turn used the services of Defendants-Appellees Mitchell N. Kay ("Kay") and the Law Offices of Mitchell N. Kay, P.C. ("the Kay Law Firm") to collect the debt. The Kay Law Firm sent a collection letter to Gonzalez, which Gonzalez asserts violated the Fair Debt Collection Practices Act ("FDCPA" or the "Act"), 15 U.S.C. § 1692e. The district court dismissed Gonzalez's case for failure to

state a claim under Federal Rule of Civil Procedure 12(b)(6). We reverse.

I. FACTUAL BACKGROUND

Gonzalez owed US Assets $448.97 based on a consumer debt he initially owed to Sprint PCS Wireless.[1] US Assets [sic] turned to the Kay Law Firm to collect the debt. On November 21, 2007, the Kay Law Firm sent a collection letter to Gonzalez.[2] The letter was printed on the Kay Law Firm's letterhead, but it was not signed. The letterhead states, "admitted in New York & Washington, D.C.," which the parties agree is a representation that Kay was admitted to practice law in these jurisdictions. The front of the letter states,

> Please be advised that your account, as referenced above, is being handled by this office.

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[1] Gonzalez actually disputed whether he owed the debt, but that issue is irrelevant to this appeal.

[2] In his brief, Gonzalez also mentions a similar letter that the Kay Law Firm sent him on January 8, 2008. However, he never referenced the latter letter in his complaint, so we may not consider it. *See Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008) ("Because the court reviews only the well-pleaded facts in the complaint, it may not consider new factual allegations made outside the complaint, including those made on appeal."). Regardless, the two letters are virtually identical.

> We have been authorized to offer you the opportunity to settle this account with a lump sum payment, equal to 65% of the balance due – which is $ 291.83!
>
> Unless you notify this office within 30 days after receiving this notice that you dispute the validity of this debt or any portion thereof, this office will assume this debt is valid.
>
> If you notify this office in writing within 30 days from receiving this notice, this office will: Obtain verification of the debt or obtain a copy of a judgment and mail you a copy of such judgment or verification.
>
> If you request this office in writing within 30 days after receiving this notice, this office will provide you with the name and address of the original creditor, if different from the current creditor.

After a large white blank space, the bottom of the letter directs the recipient to "PLEASE ADDRESS ALL PAYMENTS TO" the "Law Offices of Mitchell N. Kay, P.C." Immediately below the payment information, the letter states, "Notice: Please see reverse side for important information." A box surrounds this notice. Below the notice box is a detachable payment stub.

On the back, the letter states, in the same font and typeface as the text on the front,

> This communication is from a debt collector and is an attempt to collect a debt. Any

> information obtained will be used for that purpose.
>
> Notice about Electronic Check Conversion: Sending an eligible check with this payment coupon authorizes us to complete the payment by electronic debit. If we do, the checking account will be debited in the amount shown on the check – as soon as the same day we receive the check – and the check will be destroyed.
>
> At this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account.

Kay and the Kay Law Firm assert that this "disclaimer" language is sufficient to notify Gonzalez that lawyers were not involved in the debt collection. The parties agree that neither Kay nor any lawyers in his firm reviewed Gonzalez's file or were actively involved in sending the letter. Instead, Gonzalez asserted in his complaint that the letter was deceptive in that the Kay Law Firm "pretended to be a law firm with a lawyer handling collection of the Account when in fact no lawyer was handling the Account or actively handling the file." Gonzalez essentially contends that the Kay Law Firm is not actually a law firm at all but instead is a debt collection agency that uses the imprimatur of a law firm to intimidate debtors into paying their debts.

II. JURISDICTION AND STANDARD OF REVIEW

Gonzalez brought suit, alleging that the Kay Law Firm's debt collection letter violated the FDCPA. Relying upon the disclaimer, the district court entered a final judgment dismissing the case pursuant to Rule 12(b)(6), meaning that this court has jurisdiction under 28 U.S.C. § 1291.

"This court reviews a district court's dismissal under Rule 12(b)(6) *de novo*, accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiffs." *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008) (internal quotation marks omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). The Supreme Court recently expounded upon the *Twombly* standard, explaining that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* It follows that "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that

the pleader is entitled to relief.'" *Id.* at 1950 (quoting FED. R. CIV. P. 8(a)(2)).

When deciding whether a debt collection letter violates the FDCPA, this court "must evaluate any potential deception in the letter under an unsophisticated or least sophisticated consumer standard." *Goswami v. Am. Collections Enter., Inc.*, 377 F.3d 488, 495 (5th Cir. 2004); *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232, 1236 (5th Cir. 1997). We must "assume that the plaintiff-debtor is neither shrewd nor experienced in dealing with creditors." *Goswami*, 377 F.3d at 495. "At the same time we do not consider the debtor as tied to the very last rung on the [intelligence or] sophistication ladder." *Id.* (internal quotation marks omitted) (alteration in original). "This standard serves the dual purpose of protecting all consumers, including the inexperienced, the untrained and the credulous, from deceptive debt collection practices and protecting debt collectors against liability for bizarre or idiosyncratic consumer interpretations of collection materials." *Taylor*, 103 F.3d at 1236.

III. DISCUSSION

Congress enacted the FDCPA "to eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt

collection abuses." 15 U.S.C. § 1692(e). The FDCPA provides, "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." *Id.* § 1692e. The statute then lists several activities that violate the FDCPA. *See id.* § 1692e(1)-(16). Gonzalez claims that Kay and the Kay Law Firm violated subsections (3) and (10). Subsection (3) prohibits "[t]he false representation or implication that any individual is an attorney or that any communication is from an attorney." *Id.* § 1692e(3). Subsection (10) prohibits "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." *Id.* § 1692e(10). There is no dispute that Gonzalez is a "consumer" under the FDCPA and that Kay and the Kay Law Firm are "debt collectors" under the Act. *See id.* § 1692a(3), (6). A debt collector who violates the FDCPA is liable for actual damages, additional damages of up to $ 1,000, and attorneys' fees. *See id.* § 1692k.

There are sound policy reasons for the FDCPA's prohibition on a debt collector sending a collection letter that is seemingly from an attorney. Judge Evans of the Seventh Circuit adroitly explained the intimidation inherent in this type of communication:

> An unsophisticated consumer, getting a letter from an "attorney," knows the price of poker has just gone up. And that clearly is the reason why the dunning campaign escalates from the collection agency, which might

> not strike fear in the heart of the consumer, to the attorney, who is better positioned to get the debtor's knees knocking.

Avila v. Rubin, 84 F.3d 222, 229 (7th Cir. 1996). A letter from a lawyer implies that the lawyer has become involved in the debt collection process, and the fear of a lawsuit is likely to intimidate most consumers. "Thus, if a debt collector (attorney or otherwise) wants to take advantage of the special connotation of the word 'attorney' in the minds of delinquent consumer debtors to better effect collection of the debt, the debt collector should at least ensure that an attorney has become professionally involved in the debtor's file." *Id.* In the alternative, a lawyer acting as a debt collector must notify the consumer, through a clear and prominent disclaimer in the letter, that the lawyer is wearing a "debt collector" hat and not a "lawyer" hat when sending out the letter. *See Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360, 361-62 (2d Cir. 2005).

In *Taylor*, this court reversed the award of summary judgment to a defendant law firm under facts that were similar to those in the present case. *Taylor*, 103 F.3d at 1237. The collection letter in question included a facsimile of the lawyer's signature under the law firm's letterhead, informed consumers that the creditor had retained the law firm to collect the debt, and stated that the creditor had instructed the law firm to file suit against the debtor if the debtor did not pay the debt within ten days. *Id.* However, the summary judgment evidence demonstrated that the

lawyer and law firm were not at all involved in reviewing past due accounts or sending the letters. *Id.* In reversing the award of summary judgment to the law firm/debt collector, we held that "a debt collector, who uses a mass-produced collection letter using the letterhead and facsimile signature of a lawyer who is not actually participating in the collection process, violates § 1692e(3)." *Id.* at 1238.

In reaching this conclusion, we relied upon the Second Circuit's decision in *Clomon v. Jackson*, 988 F.2d 1314, 1321 (2d Cir. 1993). In *Clomon*, the Second Circuit held that a lawyer violated the FDCPA when he "authorized the sending of debt collection letters bearing his name and a facsimile of his signature without first reviewing the collection letters or the files of the persons to whom the letters were sent." *Id.* at 1316. This court in *Taylor* quoted the following passage from *Clomon*:

> "The use of an attorney's signature on a collection letter implies that the letter is 'from' the attorney who signed it; it implies, in other words, that the attorney directly controlled or supervised the process through which the letter was sent. . . . The use of an attorney's signature implies – at least in the absence of language to the contrary – that the attorney signing the letter formed an opinion about how to manage the case of the debtor to whom the letter was sent. . . . There will be few, if any, cases in which a mass-produced collection letter bearing the facsimile of an attorney's signature will

> comply with the restrictions imposed by § 1692e."

103 F.3d at 1238 (quoting *Clomon*, 988 F.2d at 1321) (omissions in *Taylor*) (alterations omitted). The court in *Clomon* highlighted several factors that were important to its decision that the lawyer violated the FDCPA, e.g., that the letter was on the law firm's letterhead, included the lawyer's signature, and contained language stipulating that the lawyer had considered the individual debtors' files and had made judgments on how to collect the debts. *Clomon*, 988 F.2d at 1320-21.

The Second Circuit more recently decided another FDCPA case that explains how a lawyer, acting as a debt collector, can avoid liability by including a clear and prominent disclaimer in the collection letter. *See Greco*, 412 F.3d at 365. In *Greco*, the consumer received a letter printed on a law firm's letterhead but with no signature except for the firm's name in the signature block. *Id.* at 361. The letter stated that the law firm represented the creditor for "collection and such action as necessary to protect our client." *Id.* The letter also contained the following disclaimer: "At this time, no attorney with this firm has personally reviewed the particular circumstances of your account. However, if you fail to contact this office, our client may consider additional remedies to recover the balance due." *Id.* The consumer filed suit, alleging that the letter violated Sections 1692e(3) and (10) of the FDCPA. *Id.* at 362. The district court dismissed the case under Federal Rule of Civil Procedure 12(c)

(motion for judgment on the pleadings), determining as a matter of law that the letter did not violate the FDCPA. *Id.* The Second Circuit affirmed, concluding that the disclaimer explained the limited extent of any attorney involvement in collecting the debt. *Id.* at 365. The court provided this important guidance:

> [A]ttorneys can participate in debt collection in any number of ways, without contravening the FDCPA, so long as their status as attorneys is *not misleading*. Put another way, our prior precedents demonstrate that an attorney can, in fact, send a debt collection letter without being meaningfully involved as an attorney within the collection process, so long as that letter includes *disclaimers* that should make clear even to the "least sophisticated consumer" that the law firm or attorney sending the letter is not, at the time of the letter's transmission, acting as an attorney.

Id. at 364.

The Sixth and Third Circuits also have provided some recent guidance on this issue. In *Kistner v. Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433, 440-41 (6th Cir. 2008), the Sixth Circuit concluded that there was a fact issue as to whether the letter in question was deceptive and misleading given that there were factors that cut both ways. Specifically, the letter was printed on the law firm's letterhead and made repeated references to a law firm, but it also stated that it was from a "debt collector" and was

"signed" by an unnamed "Account Representative." *Id.* at 440. Similarly, the Third Circuit ruled in *Rosenau v. Unifund Corp.*, 539 F.3d 218, 223-24 (3d Cir. 2008), that the "least sophisticated debtor" could reasonably conclude that a letter, which came from the debt collector's "Legal Department," suggested current attorney involvement.

Finally, the Middle District of Florida recently denied summary judgment to the Kay Law Firm after considering a letter that is virtually identical to the one in this case. *See Brazier v. Law Offices of Mitchell N. Kay, P.C.*, No. 8:08-cv-156, 2009 WL 764161, at *3 (M.D. Fla. Mar. 19, 2009). The court determined that the use of the law firm's letterhead and the placement of the disclaimer on the back made the question of whether the letter was deceptive a factual dispute for the jury to decide. *Id.* In particular, the court highlighted the contradiction between the law firm letterhead on the front and the disclaimer on the back of the letter. *Id.* at * 2. The court distinguished *Greco* by noting that the Second Circuit in *Greco* analyzed the language of the disclaimer, not its placement. *Id.* at 3.

In sum, the main difference between the cases is whether the letter included a clear, prominent, and conspicuous disclaimer that no lawyer was involved in the debt collection at that time. There are some letters that, as a matter of law, are not deceptive based on the language and placement of a disclaimer. At the other end of the spectrum, there are letters that are so deceptive and misleading as to violate the

FDCPA as a matter of law, especially when they do not contain any disclaimer regarding the attorney's involvement. In the middle, there are letters that include contradictory messages and therefore present closer calls. The courts in *Taylor*, *Clomon*, *Kistner*, and *Rosenau* ruled in favor of the plaintiff when the letter was on law firm letterhead, did not include any disclaimer, and (in *Taylor* and *Clomon*) included the signature of an attorney, even though the letter may have stated that it was from a "debt collector." Similarly, the court in *Brazier* ruled against the Kay Law Firm when analyzing virtually the exact same letter as here because the disclaimer, on the back of the letter, was not clear and prominent and contradicted the law firm's letterhead on the front. By contrast, the court in *Greco* ruled in favor of the law firm because the letter stated, in the body of the text, that no lawyer had personally reviewed the file.[3]

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[3] Several district court cases also have relied upon the existence – or lack thereof – of a clear disclaimer in a debt collection letter. *See Martsolf v. JBC Legal Group, P.C.*, No. 1:04-CV-1346, 2008 WL 275719, at *10 (M.D. Pa. Jan. 30, 2008) (finding liability under the FDCPA in part because "[t]he letters do not include a disclaimer stating that no attorney has personally reviewed the debt"); *Navarro v. Eskanos & Adler*, No. C 06-02231 WHA, 2007 WL 549904, at *6 (N.D. Cal. Feb. 20, 2007) (denying summary judgment because, inter alia, "[t]he letter contains no disclaimer of an attorney's involvement"); *Miller v. Wolpoff & Abramson, L.L.P.*, 471 F. Supp. 2d 243, 248 (E.D.N.Y. 2007) (noting that a lawyer need not show "meaningful involvement" to avoid liability for sending a letter if "a debt collection letter is signed by an attorney but includes a disclaimer about the extent to which attorneys are involved in

(Continued on following page)

Here, the letter was printed on the law firm's letterhead, but it was unsigned. On the back, the letter indicated that it was from a "debt collector" and included the sentence, "At this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account." This is the exact same disclaimer that the court in *Greco* found dispositive. *See Greco*, 412 F.3d at 361. However, the disclaimer in *Greco* was part of the body of the letter on the front page; a consumer who read the main text of the letter would necessarily learn that the law firm was sending the letter but that no attorneys had reviewed the file. In contrast, the "least sophisticated consumer" reading the letter from the Kay Law Firm would not learn that the letter was from a debt collector unless the consumer turned the letter over to read the "legalese" on the back. The disclaimer on the back of the letter completely contradicted the message on the front of the letter – that the creditor had retained the Kay Law Firm and its lawyers to collect the debt. That is, the disclaimer on the back may not have been *effective*. There was also ample room on the front of the letter to include this disclaimer so as to clearly articulate to the consumer the

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reviewing individual debtors' cases"); *Pujol v. Universal Fid. Corp.*, No. 03 CV 5524, 2004 WL 1278163, at *5 (E.D.N.Y. June 9, 2004) (dismissing case because the least sophisticated consumer would not believe that the attorney had individually reviewed the file given the language in the letter stating, "I have not, nor will I, review each detail of your account status, unless you so request").

nature of the law firm's involvement. Accordingly, this letter falls in that middle ground in which the letter is neither deceptive as a matter of law nor not deceptive as a matter of law. Because the "least sophisticated consumer" reading this letter might be deceived into thinking that a lawyer was involved in the debt collection, the district court prematurely dismissed Gonzalez's complaint.

We acknowledge that this is a close case, which is why further inquiry at the district court is necessary. Based only on the allegations in the complaint and the letter itself, reasonable minds can differ as to whether this letter is deceptive. Although the mere presence of disclaimer language might be dispositive in certain circumstances, the context and placement of that disclaimer is also important. We do not construe the disclaimer in isolation but must analyze whether the letter is misleading as a whole. We caution lawyers who send debt collection letters to state clearly, prominently, and conspicuously that although the letter is from a lawyer, the lawyer is acting solely as a debt collector and not in any legal capacity when sending the letter. The disclaimer must explain to even the least sophisticated consumer that lawyers may also be debt collectors and that the lawyer is operating only as a debt collector at that time. Debt collectors acting solely as debt collectors must not send the message that a lawyer is involved, because this deceptively sends the message that the "price of poker has gone up."

IV. CONCLUSION

We hold that the district court erred in concluding that Gonzalez failed to state a claim for relief that Kay and the Kay Law Firm violated the FDCPA. We therefore REVERSE the district court's judgment and REMAND for further proceedings.

REVERSED and REMANDED.

E. GRADY JOLLY, Circuit Judge, dissenting:

I respectfully dissent. Contrary to the majority's analysis, I can only conclude that this collection letter conforms in every respect to the standards for legality recognized by the Second Circuit in *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360 (2d Cir. 2005). Therefore, in my opinion, the majority creates a different but amorphous standard for the Fifth Circuit, effectively creating a circuit split. Furthermore, I believe that the majority takes the wrong road in turning to a jury to decide what is a legal question in a case involving no factual disputes.

I.

In *Greco*, the plaintiff asserted that a [*20] debt collection letter he received from the defendant law firm created the false impression that an attorney had reviewed his account. The letter was printed on the law firm's letterhead and the firm's name was used as a block signature. *Id.* at 361. The body of the

letter also implied lawyer involvement because it referred to the creditor as the firm's "client," stated that the firm was "representing" the creditor in "this matter," and warned that the "client may consider additional remedies." *Id.* These statements, suggesting attorney involvement, were countered only by the following disclaimer tucked into the body of the letter: "At this time, no attorney with this firm has personally reviewed the particular circumstances of your account." *Id.*

In reviewing this letter, the Second Circuit acknowledged that a debt collection letter sent on a law firm letterhead "implied" a certain level of attorney involvement. *Id.* at 364 (citing *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292 (2d Cir. 2003) and *Clomon v. Jackson*, 988 F.2d 1314 (2d Cir. 1993)). The court held, however, that a clear disclaimer can rectify this false implication:

> [A]n attorney can, in fact, send a debt collection letter without being meaningfully involved as an attorney within the collection process, so long as that letter includes *disclaimers* that should make clear even to the "least sophisticated consumer" that the law firm or attorney sending the letter is not, at the time of the letter's transmission, acting as an attorney.

Greco, 412 F.3d at 364. And the court concluded that the letter's disclaimer (quoted above and the same disclaimer in our letter today) was sufficiently clear. *Id.* at 365.

Under the standards enunciated in *Greco*, the letter before us now does not violate the Fair Debt Collection Practices Act ("FDCPA"). Indeed, the text of Kay's letter is significantly less suggestive of attorney involvement than the *Greco* letter. Unlike the *Greco* letter, Kay's letter does not mention "clients," "representation," "matters," "remedies," or any other jargon suggesting lawyer involvement. The body of the Kay letter contains little more than the statutorily required disclosures. *See* 15 U.S.C. § 1692g(a). The only suggestion of attorney involvement is the firm's name, "The Law Offices of Mitchell N. Kay, P.C.," which appears once in the letterhead and again in the remittal address.[1] And as earlier indicated, the Kay letter before us contains the *same* disclaimer as the approved *Greco* letter.

The question, then, is whether the disclaimer in Kay's letter reasonably explains to an unsophisticated consumer that no attorney has reviewed the account. The majority refers to Kay's disclaimer as "legalese" although the wording is identical to the disclaimer approved of in *Greco*, a case on which the majority relies. "Legalese" is surely an inaccurate description, considering that the wording is so plain: "At this time, no attorney with this firm has personally reviewed the particular circumstances of your account." This sentence does not contain a single legal term. A

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[1] Kay is required to accurately state the name of his business. *See* 15 U.S.C. § 1692e(14).

reasonable unsophisticated consumer, whom we assume can read, could not possibly have trouble understanding it.[2] And the Second Circuit concluded that the language was sufficiently clear to correct the false impression created by multiple suggestions of the *Greco* letter that attorneys were involved in the collection process. *Greco*, 412 F.3d at 365.

The majority attempts to distinguish *Greco only* on the grounds that Kay's disclaimer was placed on the back of the letter. This distinction is relevant only if we assume that an unsophisticated consumer would not turn the letter over. That assumption, however, cannot be reconciled with the hypothetical unsophisticated consumer standard, which presumes that the consumer will read a law firm collection letter carefully: "even the least sophisticated consumer can be presumed to possess a rudimentary amount of information about the world and a willingness to read a collection notice with some care." *Greco*, 412 F.3d at 363 (internal quotation marks omitted) (citing *Clomon*, 988 F.2d at 1318-19); *Gammon v. GC Servs. L.P.*, 27 F.3d 1254, 1257 (7th Cir. 1994). In this case, the letter contained, on its face, the following large-font blocked-off notice:

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[2] I use the term "unsophisticated" merely to avoid the confusion described in *Gammon v. GC Servs. L.P.*, 27 F.3d 1254, 1257 (7th Cir. 1994), not for any substantive difference. This Court has never chosen between the "least sophisticated" and the "unsophisticated" standards, but the "difference between the standards is de minimis at most." *Peter v. GC Servs. L.P.*, 310 F.3d 344, 349 n.1 (5th Cir. 2002).

Notice: Please see reverse side
for important information.

Because the unsophisticated consumer is literate and concerned with his own financial affairs, we must conclude that he will read the letter with some care, that he will see this notice in plain simple language, that he will turn the letter over for "important information," and that he will read the plain language that no attorney has reviewed his account. Indeed, the Second Circuit has held "that when a prominent instruction in the body of the letter warns that there is important information on the reverse side, a reasonable reader, even if unsophisticated, would turn the paper over and read the back." *McStay v. I.C. System, Inc.*, 308 F.3d 188, 191 (2d Cir. 2002). The Seventh Circuit has also concluded that after reading such a notice, "even unsophisticated consumers would turn the letter over to see the information on the back." *Sims v. GC Servs. L.P.*, 445 F.3d 959, 965 (7th Cir. 2006); *see also Weber v. Computer Credit, Inc.*, No. 09-CV-187 (JBW), 2009 U.S. Dist. LEXIS 57632, 2009 WL 1883046, at *6 (E.D.N.Y. June 30, 2009) ("Consumers are expected to read a debt collection letter in its entirety; no violation exists solely because the validation notice is placed on the back side of the letter."). The term "unsophisticated" is not a synonym for illiterate or ignorant or indifferent or careless. We apply an objective standard in these cases to avoid the "bizarre" and "idiosyncratic" interpretation of collection letters that are bound to arise when one presumes that the consumer does not care about his

own financial affairs and does not read the letter. *See Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232, 1236 (5th Cir. 1997).

Because Kay's letter is in conformity with *Greco*, I respectfully suggest that the majority opinion creates a circuit split.[3] This is an area of the law where national uniformity is particularly important, and therefore I respectfully dissent.

II.

The majority remands this case for a jury trial, but the facts here are undisputed. Both parties agree that no attorney was involved with Gonzalez's account. The only question is a legal question: whether the hypothetical unsophisticated consumer would, after reading the letter, believe that an attorney was involved in his case.

Although we have never expressly stated that the application of the unsophisticated consumer standard to the language of a debt collection letter is a question of law, we have always assumed this to be the case.

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[3] Kay asserts that he relied on Greco when crafting this letter. If that is true, Kay's reliance upon the Second Circuit's opinion may warrant application of the bona fide mistake exception found in § 1692k(c). *See Johnson v. Riddle*, 305 F.3d 1107, 1121-24 (10th Cir. 2002) (holding that a good faith mistake of law may satisfy § 1692k(c)); *id.* at 1122 n.14 (noting a circuit split regarding the application of § 1692k(c) to bona fide mistakes of law). That question, however, is not before us.

See Owsley v. Coldata Inc., 104 F. App'x 994, 995 (5th Cir. 2004); *Goswami v. Am. Collections Enterp., Inc.*, 377 F.3d 488, 492 (5th Cir. 2004); *Peter v. GC Servs. L.P.*, 310 F.3d 344, 346 (5th Cir. 2002); *McKenzie v. E.A. Uffman and Assocs.*, 119 F.3d 358, 362 (5th Cir. 1997); *Taylor*, 103 F.3d at 1236-37. Never before has this Court suggested that the legal import of the language of a debt collection letter should be ruled on by a jury.

The other circuit courts are split on this issue. Several circuits consider the issue a question of law. *See, e.g., Shapiro v. Dun & Bradstreet Receivable Mgmt. Servs., Inc.*, 59 F. App'x 406, 407-08 (2d Cir. 2003) (citing *Russell v. Equifax A.R.S.*, 74 F.3d 30, 34 (2d Cir. 1996)); *Wilson v. Quadramed Corp.*, 225 F.3d 350, 353 n.2 (3d Cir. 2000); [*27] *Terran v. Kaplan*, 109 F.3d 1428, 1432 (9th Cir. 1997).[4] Two circuits, however, consider it a question of fact. *See Kistner v. The Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433, 441 (6th Cir. 2008) ("a jury should determine whether the letter is deceptive and misleading");

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[4] These cases address whether language in a debt collection letter overshadowed or contradicted the disclosures required under § 1692g. Section 1692g(a) enumerates various required disclosures for debt collection letters. The question usually presented in § 1692g cases is whether, under the unsophisticated consumer standard, language in the letter contradicts or overshadows one of the required disclosures. Although this question is slightly different from the one presented in a § 1692e case, the inquiry is the same: how will an unsophisticated consumer interpret the language of a debt collection letter.

Johnson v. Revenue Mgmt. Corp., 169 F.3d 1057, 1060 (7th Cir. 1999).[5]

The existence of a circuit split is not surprising given the great difficulty that is often involved in classifying an issue as a question of fact or a question of law. The Supreme Court has noted that "the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive" and the Court has "yet to arrive at a rule or principle that will unerringly distinguish a factual finding from a legal conclusion." *Miller v. Fenton*, 474 U.S. 104, 113, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985). Generally, distinguishing between a question of fact and a question of law often turns on practical considerations; *i.e.*, whether the question is more appropriately decided by a judge or a jury. *See, e.g.*, Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 237 ("The real issue is not analytic, but allocative: what decisionmaker should decide the issue?").

Of the cases cited above, only the *Terran* case and the *Johnson* case contain a relevant discussion of the

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[5] In Kistner, the only dispute with respect to the letter was whether it "would give the least sophisticated consumer 'the impression that the letter [ ] [was a] communication [ ] from an attorney." 518 F.3d at 440 (alterations in original). Although the letter was on law firm letterhead and lacked a disclaimer of attorney involvement, the Kistner court concluded that the question should be put to a jury because it was signed by an unnamed "Account Representative" and expressly stated that it was from a debt collector. *Id.* at 440-41.

law/fact distinction. *Terran* simply noted that its decision to consider the issue a question of law was "buttressed by the rationale behind [its] *de novo* review standard for contracts and other written instruments, including collective bargaining agreements and trust agreements." 109 F.3d at 1433. In *Johnson*, Judge Easterbrook concluded that federal judges are not well-suited to determine how an unsophisticated reader will interpret a dunning letter. 169 F.3d at 1060. Analogizing FDCPA cases to trademark cases, he suggested that professional surveys are necessary to determine whether the language of a collection letter is confusing or deceptive. *Id.* In a different case, Judge Posner reiterated *Johnson's* reasoning:

> The intended recipients of dunning letters are not federal judges, and judges are not experts in the knowledge and understanding of unsophisticated consumers facing demands by debt collectors. We are no more entitled to rely on our intuitions in this context than we are in deciding issues of consumer confusion in trademark cases, where the use of survey evidence is routine.

Evory v. RJM Acquisitions Funding L.L.C., 505 F.3d 769, 776 (7th Cir. 2007). There are, however, several practical considerations that counsel against this approach.

First, the interpretation of a debt collection letter, under the FDCPA, does not involve any historical facts or other factual disputes that are the usual

forage of juries. In the case before us now, the parties agree that no lawyer was meaningfully involved with Gonzalez's account. The only question is whether the letter, read in its entirety, gave a contrary impression. Because we apply an objective standard, the question is not whether this *particular* consumer was *actually* deceived, but instead the question is whether the objective unsophisticated consumer would be deceived. The hypothetical unsophisticated consumer is just that – hypothetical. It simply represents the legal standard by which we judge the clarity and candor of a debt collection letter.

Second, the usefulness of survey evidence in evaluating whether a dunning letter conforms with the law, as suggested by the Seventh Circuit, is, at best, doubtful. *See Johnson*, 169 F.3d at 1063 (Eschbach, J., concurring). Such jury trials allow the parties to present a parade of expert witnesses to persuade jurors that one survey more accurately gleans the perspective of an unsophisticated consumer than does the counter survey. This exercise will needlessly increase the expense, the complexity, and the length of many FDCPA cases, which should be short and to the point, lest consumers be deterred from even filing FDCPA actions. *Id.*

Third, judges historically are capable of fairly applying objective standards to undisputed facts. In probable cause cases, as one of several examples, judges must consider whether the circumstances known to the officer would have caused a "reasonably prudent person" to believe that an offense had been

committed. *Evett v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force*, 330 F.3d 681, 688 (5th Cir. 2003). Moreover, interpreting contracts, documents, letters, and statutes, is the quintessential work of judges – not juries.

Fourth, a serious policy consideration is implicated here: the uniform application of a federal statute. Debt collectors often send the same letter to thousands of consumers throughout the country. Judicial determination of the deceptiveness of such letters establishes precedent and provides predictability to the parties engaged in these transactions. The majority's approach, however, significantly undermines predictability by yielding ad hoc decisions concerning a federal statute of nationwide application. Even within the same circuit, leaving these decisions to a jury, when disputed facts are not presented, will result in variation of enforcement standards of the FDCPA. If a jury in this case, for example, should conclude that this letter violates the FDCPA because the disclaimer is on the reverse side of the letter (the factor highlighted by the majority), the next jury may well determine that an unsophisticated consumer would, in fact, have enough interest in his own affairs to turn the letter over and read the disclaimer.

III.

In conclusion: The majority errs in failing to conclude that the debt collection letter in this case conforms with the standards in *Greco* and is therefore not violative of the FDCPA; consequently, the majority is incorrect in not ceding that its ruling creates a split with the Second Circuit. Furthermore, the majority departs from our precedent by referring the case to a jury for the determination of legality. For the reasons I discussed above, the issue in this case is not appropriate and practical for submission to a jury trial.

For these reasons, I respectfully dissent.

APPENDIX B

UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

JOSE GONZALEZ,

Plaintiff

v. No. H-08-563

MITCHELL N. KAY and LAW OFFICES
OF MITCHELL N. KAY, P.C.

Defendants.

Filed June 11, 2008

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

This case arises out of an attempt to collect a debt allegedly owed by Plaintiff Jose Gonzales [sic]. Now before the Court is the Motion to Dismiss of Defendants Mitchell N. Kay and Law Offices of Mitchell N. Kay, P.C. ("Kay Defendants") (Doc. 7).

I. Background

Plaintiff alleges that on November 21, 2007, he received a letter from the Kay Defendants demanding payment of $ 448.97 that he owed to Defendant U.S. Asset Management, Inc. ("USAM") for a Sprint PCS Wireless account. Plaintiff alleges that the letter stated that USAM was a client of the Kay Defendants and that the Kay Defendants were handling the

account for USAM, and that the letter was not signed.[1] The letter, attached to Plaintiff's Response, is from "Law Offices of Mitchell N. Kay, P.C.," and the letterhead states that Kay is "admitted in New York & Washington, D.C." The letter does not explicitly state that USAM was a "client" of the Kay Defendants; it states that the Kay Defendants were handling the account referenced. It also states that "[t]his communication is from a debt collector and is an attempt to collect a debt. Any information obtained will be used for that purpose." It further states that "[a]t this point in time, no attorney with this firm has personally reviewed the particular circumstances of your account."

Plaintiff alleges that the Kay Defendants violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692a *et seq* ("FDCPA"). He states that the Kay Defendants pretended to be a law firm with a lawyer handling the account, but in fact the Kay Defendants did not operate as a law firm and no lawyer was handling the account. Plaintiff alleges that the Kay Defendants did this to try to scare him into paying the debt. Plaintiff also seeks a declaration that he

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[1] The letter attached to Plaintiff's Complaint as Exhibit A is not the November 2007 letter. The November 2007 letter is attached to Plaintiff's Response as Exhibit A. As discussed below, the Court may review documents attached to a later pleading if those documents are referred to in the Complaint. The November 2007 letter is discussed in the Complaint, and the Court may therefore consider it in deciding the Motion to Dismiss.

does not owe the debt identified by account number 1170098994402-A to USAM or its affiliates.

II. Legal Standard

A party is entitled to dismissal under Fed. R. Civ. P. 12(b)(6) when an opposing party fails to state a claim upon which relief may be granted. When considering a motion to dismiss for failure to state a claim, the Court accepts as true all well-pleaded allegations in the complaint and views them in the light most favorable to the plaintiff. *See Collins v. Morgan Stanley Dean Witter,* 224 F.3d 496, 498 (5th Cir. 2000) (noting that a court must construe the complaint liberally in favor of the plaintiff); *see also Malina v. Gonzales,* 994 F.2d 1121, 1125 (5th Cir. 1993). "A motion to dismiss under Rule 12(b)(6) is viewed with disfavor and is rarely granted." *Collins,* 224 F.3d at 498. The Court must determine whether a plaintiff's allegations "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007). The complaint must contain allegations of "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974.

In general, the court may only consider the pleadings and any attachments to the pleadings. *See Collins,* 224 F.3d at 498. However, the court may consider attachments to the motion to dismiss of documents referred to by the plaintiff in the complaint. *See id.* at 498-9.

III. Analysis

The FDCPA applies to debt collectors attempting to collect consumer debts. Plaintiff has pled facts showing that he is a consumer ("any natural person obligated or allegedly obligated to pay any debt" for, among other things, services for personal or household use) and that the Kay Defendants are debt collectors ("any person who uses . . . the mails in any business the principal purpose of which is the collection of any debts"). 15 U.S.C. § 1692a. The Kay Defendants do not dispute these facts, and the Court finds that the FDCPA applies to this case.

The FDCPA prohibits a debt collector from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. The statute specifically prohibits the "[t]he false representation or implication that any individual is an attorney or that any communication is from an attorney" and "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." 15 U.S.C. § 1692e(3), (10). The former provision is intended to prevent consumers from being intimidated into paying debts they do not owe because of the specter of attorney involvement when in fact no attorney is involved. Claims are evaluated under a "least sophisticated consumer" standard, meaning that the Court will decide whether the hypothetical least sophisticated consumer would have been deceived. *Taylor v. Perrin, Landry, deLaunay & Durand,* 103 F.3d 1232, 1236 (5th Cir. 1997);

Sparkman v. Zwicker & Assocs., P.C., 374 F. Supp. 2d 293, 301 (E.D.N.Y. 2005).

Courts have generally found that letters on law firm letterhead that were signed by an attorney (whether by facsimile signature or otherwise) violate the FDCPA if the attorney was not in fact involved in the case and the letter did not contain any disclaimer.[2] *See, e.g., Avila v. Rubin*, 84 F.3d 222, 228 (7th Cir. 1996); *Taylor*, 103 F.3d at 1237. The signature of the attorney is an important fact in deciding whether the letter gives the impression that an individual attorney reviewed the file or prepared the letter. *See Taylor*, 103 F.3d at 1238; *Clomon v. Jackson*, 988 F.2d 1314, 1321 ("[T]he use of the attorney's *signature* on a collection letter implies that the . . . attorney directly controlled or supervised the process through which the letter was sent." (emphasis added)); *Campuzano-Burgos v. Midland Credit Mgmt.*, 497 F. Supp. 2d 660, 663-4 (E.D. Pa. 2007) ("Although *Clomon* dealt with facts similar to *Avila*, its reasoning focused not on the attorney's professional obligations but on the additional authority his signature connoted.")

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[2] In *Boyd v. Wexler*, 275 F.3d 642 (7th Cir. 2001), the Seventh Circuit referred only to letters on law firm letterhead and did not specify whether the letters were signed by an attorney. However, in a subsequent case, *Nielsen v. Dickerson*, 307 F.3d 623, 635 (7th Cir. 2002), the Seventh Circuit clarified that "a debt collection letter that is issued on an attorney's letterhead and *over his signature*" (emphasis added) creates the impression that the attorney has personally reviewed the case.

Here, it is apparently undisputed, at least for the purposes of this Motion, that neither Kay himself nor any attorney associated with the Kay Defendants actually performed any meaningful review of Plaintiff's file, so if the letter gave the impression that a lawyer was so involved, the letter violated the FDCPA. The letter was not signed by the Kay Defendants or any other attorney. Although Plaintiff alleges that the letter referred to USAM as the Kay Defendants' "client," the letter does not in fact do so, nor is there any other language that could possibly be interpreted as meaning that the Kay Defendants and USAM had an attorney-client relationship. *Cf. Clomon,* 988 F.2d at 1320-1 (letter stated that attorney had "told" client certain facts about the account and was "suggesting" certain measures); *Miller v. Wolpoff & Abramson, L.L.P.,* 471 F. Supp. 2d 243, 246 (E.D.N.Y. 2007) (letter from one law firm stated that law firm represented the creditor). The letterhead's use of the law firm name and the notation of states in which Kay was admitted to practice law is the only aspect of the letter that could indicate attorney involvement.

Therefore, the question is whether the firm letterhead is enough to have caused the "least sophisticated consumer" to think that an attorney was involved in the case. To remove any confusion that the letterhead might have caused, the letter contained a notice stating that no attorney had reviewed

the account so far.[3] Even where an attorney has signed a letter concerning a debt that he has not personally reviewed, an attorney is not liable under the FDCPA if the letter also contains a sufficient and clear disclaimer. *See Miller,* 471 F. Supp. 2d at 249. Here, the letter contained a disclaimer stating that no attorney had reviewed the account so far. This notice was not deceptive. "A notice is deceptive when it reasonably can be read to have two or more different meanings, one of which is inaccurate." *Sparkman,* 374 F. Supp. 2d at 301; *see also Peter v. GC Servs., L.P.,* 310 F.3d 344, 349 (5th Cir. 2002) (noting that courts find contradictory language primarily where statements are *explicitly* contradictory). The disclaimer in the letter to Plaintiff admits only one reasonable meaning. Other courts have found that this type of disclaimer, on letterhead with a law firm name and with the signature of the law firm or attorney, suffices to eliminate any possible confusion generated by the letterhead. *See Greco v. Trauner, Cohen & Thomas, L.L.P.,* 412 F.3d 360, 364-5 (2d Cir.

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[3] Plaintiff claims this notice violates the FDCPA because it left open the possibility that an attorney might review the file in the future. This is not deceptive because it was possible that an attorney could review the file, and in fact, the Court is sure that by this point an attorney has reviewed Plaintiff's file. The fact that the disclaimer leaves that possibility open does not constitute a threat of legal action. In addition, the Kay Defendants could not have used a different name on the letterhead. 15 U.S.C. § 1692e(14) prohibits "[t]he use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization."

2005); *Pujol v. Universal Fidelity Corp.*, No. 03 CV 5524(JG), 2004 U.S. Dist. LEXIS 10556, 2004 WL 1278163, at *5 (E.D.N.Y. June 9, 2004); *Navarro v. Eskanos & Adler*, No. C 06-02231 WHA, 2007 U.S. Dist. LEXIS 15046, 2007 WL 549904, at *6 (N.D. Cal. Feb. 20, 2007) ("The least sophisticated consumer would not be deceived or misled as to attorney involvement if the communication contained a clear disclaimer stating that an attorney had not reviewed the file.").

This Court agrees. The letter was not signed by an individual attorney, a fact that might cause a debtor to believe that the signer had reviewed the debtor's file. The disclaimer should have removed any confusion that even the least sophisticated consumer would have had concerning the level of attorney involvement in the matter. The letter was not deceptive as a matter of law under either 15 U.S.C. § 1692e(3) or 15 U.S.C. § 1692e(10).

IV. Conclusion

For these reasons, Plaintiff has failed to state a claim under the FDCPA against the Kay Defendants. It is, therefore, **ORDERED** that the Motion to Dismiss (Instrument no. 7) of Mitchell N. Kay and the Law Office of Mitchell N. Kay, P.C., is **GRANTED** and the Plaintiff's claims against the Kay Defendants are **DISMISSED WITH PREJUDICE**.

DONE at Galveston, Texas, this 11th day of June, 2008.

/s/ John R. Froeschner
John R. Froeschner
United States Magistrate Judge

APPENDIX C

15 U.S.C. § 1692e

§ 1692e. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of –

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to –

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this title.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if

the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 603(f) of this Act.

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No. 09-542

IN THE

Supreme Court of the United States

MITCHELL N. KAY AND
LAW OFFICES OF MITCHELL N. KAY, P.C.,
PETITIONER

v.

JOSE GONZALEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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RESPONSE TO STATEMENT OF THE CASE

Pursuant to Rule 15 of the Rules of the Supreme Court of the United States, the Respondent offers this response and clarification to the Petitioners' Statement of the Case.

In the last sentence of the Petitioners' Statement of the Case, the Petitioners assert that the "Fifth Circuit remanded the case back to the District Court for a jury trial on the issue of whether the 'Least Sophisticated Consumer' would be deceived into thinking that a lawyer is involved in the collection of Respondent's debt simply because the disclaimer language approved by the Second Circuit was contained on the back of the letter and not on the front."[1] This is an inaccurate characterization of the Fifth Circuit's decision. The Fifth Circuit stated:

> We acknowledge that this is a close case, which is why further inquiry at the District Court is necessary. ***Based only on the allegations in the Complaint and the letter itself, reasonable minds can differ as to whether this letter is deceptive***. Although the mere presence of disclaimer language might be dispositive in certain circumstances, the ***context and placement*** of that disclaimer is also important. ***We do not construe the disclaimer in isolation but must analyze whether the letter is misleading as a whole***. We caution lawyers who send debt collection letters to state clearly, prominently, and conspicuously, that although the letter is from a lawyer, the lawyer is acting solely as a debt collector and not in any

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[1] Petition for a Writ of Certiorari, page 4.

> legal capacity when sending the letter. The disclaimer must explain to even the least sophisticated consumer that lawyers may also be debt collectors and that the lawyer is operating only as a debt collector at that time. ***Debtor collectors acting solely as debt collectors must not send the message that a lawyer is involved, because this deceptively sends the message that the "price of poker has gone up."***[2]

The Fifth Circuit's allusion to the importance of "the allegations in the complaint," the "context" of the disclaimer, and the prohibition against debt collectors acting solely as debt collectors sending any message that a lawyer is involved, stems from its recognition early in the opinion of the Respondent's claim as pleaded in the Complaint:

> Gonzalez essentially contends that the Kay Law Firm is not actually a law firm at all but instead is a debt collection agency that uses the imprimatur of a law firm to intimidate debtors into paying their debts.[3]

Thus, the position of the disclaimer was only one factor in the Fifth Circuit's decision to remand the case to the District Court for further proceedings. The Fifth Circuit based its decision on the allegations in the Complaint, the facts (as pleaded and accepted as true) underlying the letter, and the letter as a whole, which included the language, context, and position of the

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[2] *Gonzalez v. Kay*, 577 F.3d 600, 607 (5th Cir. 2009) (emphasis added) (*quoting Avila v. Rubin*, 84 F.3d 222, 229 (7th Cir. 1996).

[3] *Id.* at 603.

disclaimer and determined that reasonable minds could differ as to whether the letter was deceptive.

REASONS THE PETITION SHOULD BE DENIED

There is no conflict among the Circuit Courts of Appeals on any issue involved in this case. No Circuit Court of Appeals other than the Fifth Circuit Court of Appeals has decided whether a disclaimer worded like the one at issue and placed on the back of a collection letter sent by a collection agency purporting to be a law firm can save a debt collector from violations of § 1692e(3) and (10) on a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Therefore, this Court should deny the Petition for a Writ of Certiorari.

A. The Fifth Circuit's Decision in *Gonzalez v. Kay,* is Not in Conflict with the Second Circuit's Decision in *Greco v. Trauner, Cohen & Thomas, LLP.*

The Petitioners contend that the Fifth Circuit's decision in this case is in conflict with the decision reached by the Second Circuit Court of Appeals in *Greco v. Trauner, Cohen & Thomas, LLP* [4] (referred to hereinafter as "*Greco*"). This is not true. In reaching its decision in this case, the Fifth Circuit relied on the same jurisprudence that the Second Circuit relied on in *Greco.* The Fifth Circuit reached a different decision than the Second Circuit, because the allegations in the Respondent's complaint and the content of the letter were different in this case than in *Greco.*

The Petitioners have tried to paint the case below as identical to *Greco.* It is not. The only similarity is the wording of the disclaimer at issue. In *Greco,* the Second

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[4] 412 F.3d 360 (2d Cir. 2005).

Circuit began its opinion characterizing the plaintiff's allegations as follows:

> First, he asserted that ***the letter misleadingly represented the level of attorney involvement***, thereby violating, in violation of § 1692e's general ban on deceptive practices in connection with debt collection, § 1692e(3)'s ban on falsely representing that an individual is an attorney, and § 1692e(10)'s ban on deceptive means to collect a debt.[5]

In this case, the Fifth Circuit began its opinion characterizing the Respondent's allegations as follows:

> . . . Gonzalez asserted in his complaint that the letter was deceptive in that the Kay Law Firm "pretended to be a law firm with a lawyer handling collection of the Account when in fact no lawyer was handling the Account or actively handling the file." ***Gonzalez essentially contends that the Kay Law Firm is not actually a law firm at all but instead is a debt collection agency that uses the imprimatur of a law firm to intimidate debtors into paying their debts***.[6]

The Fifth Circuit in this case was not faced with an allegation about only the level of Petitioners' attorney involvement with the debt – it was faced with an allegation that the Petitioners are not a law firm at all, but merely a collection agency posing as a law firm. This is a key distinction between the cases that cannot be lost.

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[5] *Greco*, 412 F.3d at 362 (emphasis added).

[6] *Gonzalez*, 577 F.3d at 603. (emphasis added).

The fact that the Petitioners' collection letter included a disclaimer worded like the disclaimer used in the letter in *Greco* misses the point – of course no attorney had reviewed the debtor's account in this case, because the Petitioners are not a law firm but a collection agency pretending to be a law firm!

Despite the crucial differences between the allegations in this case and *Greco*, both the Fifth Circuit and the Second Circuit analyzed the cases before them using the analysis provided in the Second Circuit's opinion in *Clomon v. Jackson*[7]. Both courts even quoted the same paragraph at page 1321 of the *Clomon* case.[8] In that paragraph, the Second Circuit in *Clomon* held that use of an attorney's signature on a collection letter implies that the letter is "from" the attorney who signed it and in the absence of language to the contrary that "the attorney signing the letter formed an opinion about how to manage the case of the debtor to whom the letter was sent."[9] The Court in *Clomon* continued to opine that because in most mass mailings this is false, that there would be few, if any, cases "in which a mass-produced collection letter bearing the facsimile of an attorney's signature will comply with the restrictions imposed by § 1692e."[10] This was the starting point for both the *Greco* court and the *Gonzalez* court.

This was, however, also the ending point for the Second Circuit in *Greco*, because the only allegation made by the plaintiff in that case was that no attorney was involved in reviewing the account before preparing the collection letter. The plaintiff in *Greco* did not allege

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[7] 988 F.2d 1314 (2d Cir. 1993).

[8] *See Gonzalez*, 577 F.3d at 604-05; *Greco*, 412 F.3d at 364.

[9] *Clomon*, 988 F.2d at 1321.

[10] *Id.*

facts about the defendant or its operations outside of the letter that had bearing on whether the language of the letter was deceptive. There was a disclaimer in the body on the front of the collection letter stating that no attorney had yet reviewed the account. Applying the "least sophisticated consumer" standard, the Second Circuit decided that this letter could not have misled even the least sophisticated consumer into believing that an attorney was involved in reviewing the account before the letter was prepared.

The Fifth Circuit did not ignore *Greco* and did not contradict it. Immediately after its discussion of the jurisprudence of the *Clomon* case, the Fifth Circuit began a discussion of the decision reached in *Greco*.[11] The Fifth Circuit quoted *Greco* at length to the effect that "attorneys can participate in debt collection in any number of ways, without contravening the FDCPA, so long as their status as attorneys is *not misleading*."[12] The Fifth Circuit did recognize that *Greco* was based on the language of the disclaimer and not the position of the disclaimer. The Fifth Circuit also noted that in *Greco* the disclaimer was included in the body of the letter on the front; not a disclaimer on the back. In addition, as it had already stated in the opinion, the Fifth Circuit in this case was dealing with factual allegations in the Respondent's complaint that differed from those in *Greco*. Namely, that the Petitioners were not a law firm but were posing as one. Under the standard of review for dismissal under Rule 12(b)(6), the Fifth Circuit was obligated to take those factual allegations as true.

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[11] *Gonzalez*, 577 F.3d at 605.

[12] *Id.* (*quoting Greco*, 412 F.3d at 364).

The Fifth Circuit, faced with different factual allegations, a differently worded collection notice, and a disclaimer on the back instead of the front of the collection notice, was required to look further than the Second Circuit in *Greco*.

The Fifth Circuit recognized that there are generally three common situations that arise with respect to collection notices: (1) those collection letters that are clearly in violation of the FDCPA based on their language and complete lack of any disclaimer,[13] (2) those collection letters that are clearly not in violation of the FDCPA based on their language and the placement of their disclaimers, and (3) those collection letters that fall somewhere in between due to contradictory messages. The Fifth Circuit also recognized that *Greco* was a case in which the collection letter was clearly not a violation of the FDCPA. However, the Fifth Circuit held that the case before it, with the facts and allegations pleaded, was a case that presented a question of fact for a jury to determine.

This decision does not present a conflict with the Second Circuit's *Greco* decision. This Court should deny the Petition for a Writ of Certiorari.

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[13] *Gonzalez*, 577 F.3d at 606 (Court citing *Rosenau v. Unifund Corp.*, 539 F.3d 218 (3d Cir. 2009), *Kistner v. Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433 (6th Cir. 2008), *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232 (5th Cir. 1997), and *Clomon v. Jackson*, 988 F.2d 1314 (2d Cir. 1993) as cases that dealt with letters that were clearly in violation of the FDCPA).

B. The Fifth Circuit's Decision in *Gonzalez v. Kay*, is Not in Conflict with Other Courts of Appeals on the Issue of Whether Review of a Collection Letter Should be a Question of Law for the Court or a Question of Fact for the Jury.

The Petitioners contend that there is a split between the Second, Third and Ninth Circuits on the one hand and the Sixth and Seventh Circuits on the other hand on the issue of whether a "collection letter" should be reviewed for violations of the FDCPA by the court as a question of law or by the jury as a question of fact. Petitioners further contend that the Fifth Circuit's decision in this case adds to and widens that split among the Circuits.

The Petitioners have tried their best to mischaracterize a series of cases to create an illusion that there is some separate body of jurisprudence dealing with review of "collection letters." Yet nowhere in the FDCPA did Congress use the word "collection letter" or even "letter". Congress almost exclusively used the terms "communications"[14] and "representations"[15]

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[14] 15 U.S.C. § 1692a(2) defines "communication" as the "conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692b regulates the conduct of "any debt collector *communicating* with any person other than the consumer for the purpose of acquiring location information." (emphasis added). 15 U.S.C. § 1692c governs "*communication* with the consumer generally", "*communication* with third parties", and "ceasing *communication*." (emphasis added). 15 U.S. C. § 1692e(3) prohibits "the false representation or implication that any individual is an attorney or that any *communication* is from an attorney." (emphasis added). 15 U.S.C. § 1692e(8) prohibits "*communicating* or threatening to *communicate* to any person credit information which is known or

throughout the various sections of the FDCPA. Congress is presumed to have known how to use a term like "collection letter" had it wanted to do so. Congress evidenced its intention to accomplish different goals in different sections by choosing language other than "communication" and "representation" on a handful of occasions where it thought necessary. For instance,

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which should be known to be false, including the failure to *communicate* that a disputed debt is disputed." 15 U.S.C. § 1692e(9) prohibits "the use or distribution of any written *communication* which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval." (emphasis added). 15 U.S.C. § 1692e(11) prohibits "The failure to disclose in the initial written *communication* with the consumer and, in addition, if the initial *communication* with the consumer is oral, in that initial oral *communication*, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose." (emphasis added). 15 U.S.C. § 1692f(7) prohibits a debt collector from *communicating* with a consumer regarding a debt by "post card." (emphasis added). 15 U.S.C. § 1692f(8) prohibits a debt collector from "using any language or symbol, other than the debt collector's address, on any envelope when *communicating* with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business." (emphasis added).

[15] 15 U.S.C. § 1692e prohibits a debt collector from using any false, deceptive, or misleading *representation* or means in connection with the collection of any debt. Subsection (3) of that section specifically prohibits "the false *representation* or implication that any individual is an attorney or that any *communication* is from an attorney." (emphasis added). Subsection (10) of that section prohibits "the use of any false *representation* or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." (emphasis added).

Congress very selectively used the terms "postcard,"[16] "envelope,"[17] "use of the mails,"[18] "any instrument of interstate commerce or the mails,"[19] "telegram,"[20] "certain deceptive forms,"[21] "written notice,"[22] and "notifies ... in writing."[23] For the Petitioners to characterize the decisions of the Circuit Courts of Appeals regarding "collection letters" as somehow a different category within FDCPA jurisprudence is disingenuous. No such separate category exists.

If this Court ignores the notion of a separate category of review for "collection letters" and remains focused on the procedural posture of the Courts of Appeals review of such letters as "communications" and "representations" on motion to dismiss and motion for summary judgment, what emerges is not a Circuit split at all, but a body of intelligent case law developed over the past 20 years that continues to guide and assist both counsel and the industry in understanding exactly what is prohibited under the FDCPA. There has never been, and there should not ever be, special treatment or separate jurisprudence for "collection letters" as opposed to any other form of communication or representation governed by the FDCPA. To create such a special category would be sidestepping Congress' carefully chosen and clearly expressed statutory language in favor of judicial legislation at its worst.

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[16] 15 U.S.C. § 1692f(7).
[17] 15 U.S.C. § 1692f(8).
[18] 15 U.S.C. § 1692f(8).
[19] 15 U.S.C. § 1692a(6).
[20] 15 U.S.C. § 1692f(8).
[21] 15 U.S.C. § 1692j.
[22] 15 U.S.C. § 1692g.
[23] 15 U.S.C. § 1692g(b).

Perhaps the easiest way to see that there is no split among the Circuits on this issue is to look closely at what the Courts of Appeals actually decided in each of the cases Petitioners has cited.

Petitioners assert that the split is between the Second, Third, and Ninth Circuits on one hand that supposedly have held that the question of whether a "collection letter" is false, misleading or deceptive a question of law for the Court, and the Fifth, Sixth, and Seventh Circuits on the other hand that supposedly have held that such a determination is a question of fact for a jury. The cases that the Petitioners cite for the former proposition are *Shapiro v. Dun & Bradstreet Receivable Mgmt. Servs., Inc.*,[24] *Russell v. Equifax A.R.S.*,[25] *Wilson v. Quadramed Corp.*,[26] and *Terran v. Kaplan*.[27] Each of these four cases dealt only with the question of whether language within a debt collection letter overshadowed or contradicted the 30 day validation notices required by section 1692g of the FDCPA.

In *Shapiro v. Dun & Bradstreet Receivable Mgmt. Servs., Inc.*, the Second Circuit affirmed the District Court's order granting the collection agency/defendant's motion to dismiss under Rule 12(b)(6).[28] In that case, the plaintiff alleged only that D&B's collection letter violated section 1692g(a)(3) - (4) and 1692e(10) by containing language in the body of the letter[29] that overshadowed or

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[24] 59 Fed. Appx. 406, 407-08 (2d Cir. 2003).

[25] 74 F.3d 30, 34 (2d Cir. 1996).

[26] 225 F.3d 350, 353 n. 2 (3d Cir. 2000).

[27] 109 F.3d 1428, 1432 (9th Cir. 1997).

[28] 59 Fed. Appx. at 1.

[29] The language within the body of the letter that Shapiro claimed overshadowed or contradicted the validation notice was the following:

contradicted the validation notice.[30] The Court, citing the prior Second Circuit case of *Russell v. Equifax A.R.S.*,[31] stated "the question of whether language in a collection letter overshadows or contradicts other language in an impermissible fashion is a question of law we review *de novo*."[32] With no question of fact presented and no factual allegations aside from the language of the letter itself, the Second Circuit was able to construe the letter under the "least sophisticated consumer" standard and determine as a question of law that Shapiro had not stated a claim upon which relief could be granted. For this reason, the Second Circuit affirmed the judgment of the District Court.

In *Wilson v. Quadramed Corp.*, the Third Circuit affirmed the District Court's judgment dismissing the plaintiff's claims on the defendant's motion to dismiss under Rule 12(b)(6).[33] In that case, the plaintiff alleged only that Quadramed Corp.'s collection letter violated section 1692g(a) by containing language in the body of

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> If there are any questions regarding this account, or if you wish to make payment arrangements, please contact [the creditor] directly at [800-number]. Should you wish to dispute this account, please refer to the notice on the reverse side of this letter. . . . If you have already remitted this payment, thank you, and you can disregard this letter.

Shapiro, 59 Fed. Appx. 1 – 2.

[30] *Id.*

[31] The Second Circuit's decision in *Russell* was on the same issue as the decision in *Shapiro*, so the opinion in *Russell* is not discussed here.

[32] *Id.*

[33] 225 F.3d at 351.

the letter[34] that overshadowed or contradicted the validation notice.[35] The Third Circuit never made an affirmative statement in *Wilson v. Quadramed* that the determination of the issue must be by the court as a question of law. Nevertheless, there were no questions of fact presented, so the Third Circuit ruled on the remaining question of law presented. The Court reviewed the language of the letter, applied the "least sophisticated consumer" standard, and found as a matter of law that the letter did not violate section 1692g.[36]

In *Terran v. Kaplan*, the Ninth Circuit reversed the District Court's judgment rendered after a bench trial in favor of the plaintiff on his claim under section 1692g, which was the only claim in the plaintiff's complaint after the plaintiff voluntarily dismissed all other claims.[37] Terran's only allegation was that language within the body of the collection letter overshadowed and contradicted the validation notice required by section 1692g.[38] In deciding on the appropriate standard of review of the District Court's judgment after a bench trial, the Court of Appeals elucidated:

> Similarly, determination of whether language in a collection letter overshadows or contradicts the

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[34] The language contained in a debt collection letter that Wilson asserted was violative was language stating that the account has been placed with the debt collector for "immediate collection," and that it "shall afford [the debtor] the opportunity to pay this bill immediately and avoid further action against you." *Wilson*, 225 F.3d at 351.

[35] *Id.*

[36] *Id.*

[37] 109 F.3d at 1430 - 31.

[38] *Id.* at 1431.

> validation notice required by section 1692g so as to mislead or confuse a least sophisticated debtor does not turn on the credibility of extrinsic evidence. . . . Thus, we review Terran's claim that the collection letter violated section 1692g *de novo*. . . . "Our role ... is ... the essentially negative one of examining whether a given notice comports with the requirements of the statute."[39]

This is a way of recognizing that there is no factual issue involved where the only allegation is the legal impact of the language contained within a letter. It should not escape notice that in *Terran*, the case was tried to the bench, making the Court the finder of fact, to the extent there were questions of fact involved.

What is clear upon this close review of the cases is that the Second, Third, and Ninth Circuits have not decided that a determination of whether a collection letter violates the FDCPA is always a question of law for the court. These Courts of Appeals merely decided the issue under section 1692g as a question of law, because there were no questions of fact presented. These cases involved only the language contained within the collection letter, involved no "extrinsic evidence," and called for application of the "least sophisticated consumer" standard to determine if the language in the body of the letter overshadowed or contradicted the language of the validation notice in the letter.

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[39] *Id.* at 1433 (*quoting Payco-General Am. Credits, Inc.*, 943 F.2d 482, 485 (4th Cir. 1991)).

In *Peter v. G.C. Services, LP*,[40] the Fifth Circuit, a Circuit that the Petitioners assert is in conflict with the Second, Third, and Ninth Circuits on this issue, decided the issue under section 1692g using the exact same analysis used by the Second, Third, and Ninth Circuits. In fact, all of the Circuit Courts of Appeals that have written on this particular issue have followed the same analysis.[41]

So what are these Sixth and Seventh Circuit cases that the Petitioners claim represent a split in the Circuits? Let us look at each of the two cases that the Petitioners cite very carefully to see what, if anything, is afoot.

One of the two cases Petitioners cite is *Kistner v. The Law Offices of Michael P. Margelefsky, LLC*, in which the Sixth Circuit analyzed an attorney's collection letter on cross-motions for summary judgment to determine if it violated section 1692e(3).[42] The Sixth Circuit found that there was a genuine issue of material fact, reversed the District Court's summary judgment in favor of the defendants, and remanded the case to the District Court.[43] The Court of Appeals found there was a genuine issue of material fact as to

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[40] 310 F.3d 344, 349 – 350 (5th Cir. 2002)(citing *Terran v. Kaplan*, *Russell v. Equifax A.R.S.*, and *Wilson v. Quadramed Corp.*).

[41] *Federal Home Loan Mortgage Corp. v. Lamar*, 503 F.3d 504, 509 – 510 (6th Cir. 2007); *Bartlett v. Heibl*, 128 F.3d 497, 501 (7th Cir. 1997); *Miller v. Payco-General American Credits, Inc.*, 943 F.2d 482 (4th Cir. 1991); *See Wilhelm v. Credico, Inc.*, 519 F.3d 416 (8th Cir. 2008); *See also Vega v. McKay*, 351 F.3d 1334 (11th Cir. 2003). As far as the Respondent can tell from his survey of the cases, the First and Tenth Circuits have never decided a case on this particular issue.

[42] 518 F. 3d 433, 441 (6th Cir. 2008).

[43] Id. at 434.

whether the communication was deceptive and misleading, because there was summary judgment evidence in the record creating a fact issue on the attorney's involvement. The summary judgment evidence included, among other things, the deposition testimony of defendant Margelefsky.[44] Thus, clearly there was "extrinsic evidence" that the Court was required to consider, outside of the language of the letter itself, that had a bearing on whether the letter was misleading and deceptive. That "extrinsic evidence" precluded the Court from considering the language of the collection letter only and ruling as a matter of law.

The only other case cited by the Petitioners is *Johnson v. Revenue Mgmt. Corp.*, a case in which the Seventh Circuit decided whether the language of a collection letter overshadowed the validation notice contained in that letter.[45] In that case, the Seventh Circuit reversed and remanded the District Court's order dismissing the plaintiff's section 1692g claim on a Rule 12(b)(6) motion. Although one would expect the Seventh Circuit to have ruled on the issue as a matter of law as it did in *Bartlett v. Heibl* just two years earlier, the Court cautioned that "because the skeletal presentation in a notice pleading may be fleshed out later, a decision without giving plaintiff the opportunity to argue or augment his position is premature."[46] The Court opined further that "if all the plaintiffs have to go on is the language of these letters, they must lose in the end."[47]

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[44] Id. at 440.

[45] 169 F.3d 1057, 1060 (7th 1999).

[46] Id.

[47] Id.

Nevertheless, *Johnson* does not present a conflict among the Circuits. As noted above, in *Bartlett v. Heibl* the Seventh Circuit held that a determination of whether a collection letter violates section 1692g(a) by containing language that overshadows the validation notice is a question of law for the Court.[48]

The end result of this survey of the cases Petitioner cited is that there is currently no conflict among the Circuits at all in applying the "least sophisticated consumer" test to determine whether a letter violates the FDCPA. In each of the cases the Petitioners cited, the Courts of Appeals reviewed the "collection letter" as a communication, representation, or written notice depending upon the section of the FDCPA the plaintiff alleged in her complaint. The cases came before the Courts of Appeals either on review of an order on motion to dismiss or motion for summary judgment. If there were no allegations pleaded in the complaint (with respect to motions to dismiss) or summary judgment evidence offered (with respect to motions for summary judgment) that was "extrinsic" to the letter, there was only one thing remaining for the Courts to do - determine whether the language of the letter violated the FDCPA. Where there were facts pleaded in the complaint that were "extrinsic" to the letter, the Courts did not dismiss the claim as a matter of law. Where there were facts presented as summary judgment evidence that were "extrinsic" to the letter and that related to whether the letter violated the FDCPA, the Courts did not grant a summary judgment

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[48] 128 F.3d 497, 501 (7th Cir. 1997).

as a matter of law.[49] The Circuit Courts of Appeals have decided these cases with clarity and consistency.

Regardless of the fact that there is currently no split among the Circuit Courts of Appeals, Respondent would contend that to the extent that a Court should decide that the language contained within a collection letter presents a question of fact, such a decision should not be considered judicially strange or dangerous. A collection letter is nothing more than a form of communication; a gathering of written representations made by a debt collector. The Petitioners would not flinch if a Court of Appeals decided that a series of oral statements made by a debt collector in the heat of a collection call constituted a question of fact for a jury to determine. There is no difference between these oral statements as a communication and written statements in a collection letter as a communication.

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[49] There have been instances where there was no issue of fact regarding the "extrinsic" evidence, in which case the Courts were free to determine as a question of law whether the letter contained misleading or deceptive representations. *See e.g. Goswami v. American Collection Enterprises, Inc.* 377 F.3d 488 (5th Cir. 2004), *cert. denied*, 126 S.Ct. 331, 163 L.Ed.2d 44 (2005). In *Goswami* the defendant's collection letter was a settlement letter stating that the plaintiff had only 30 days to take advantage of the settlement, which was a discount of 30% off the debt. *Goswami*, 377 F.3d at 492. The plaintiff alleged in her complaint that this was a false, misleading, and deceptive representation, because the defendant had authority to settle the debt outside of that time period. *Goswami*, 377 F.3d at 495. The summary judgment evidence showed that the defendant had authority to settle the debt for up to a 50% discount and at any time. *Id.* The Fifth Circuit held that there was no genuine issue of material fact and granted judgment as a matter of law to the plaintiff, reversing the judgment of the District Court.

The concept of a jury trial to determine whether a representation in a letter is deceptive seems to have been contemplated by Congress. In Section 1692k Congress specifically and expressly addressed certain instances in which the court, as opposed to a jury, must make the determination. In section 1692k(a)(2), Congress expressly provided that the amount of additional damages awarded to a successful consumer shall be "as the court may allow."[50] In section 1692k(a)(3), Congress gave the court the sole ability to make awards of attorney's fees and costs to a successful consumer or to a debt collector where the suit was brought in bad faith for the purposes of harassment.[51] Congress left all other questions of fact to a jury, if one was requested by either party. There is simply nothing offensive about the notion of allowing a jury to review a collection letter to determine if, as a question of fact, it contains false, misleading, or deceptive representations.

In this case, the Respondent alleged in his complaint that the Petitioners' collection letter was not sent by a law firm at all, but by a collection agency posing as a law firm and that there were no attorneys that would ever review the Respondent's account. The Fifth Circuit decided that the Respondent's claims could not be dismissed on the grounds of the disclaimer only, and that the disclaimer on the back of the letter could not, as a matter of law, salvage such a misrepresentation. The Fifth Circuit wisely stated that the letter also did not contain misrepresentations as a matter of law. The Fifth Circuit's decision recognized that there were factual allegations outside of the letter

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[50] 15 U.S.C. § 1692k(a)(2)(A) – (C) & (b).

[51] 15 U.S.C. § 1692k(a)(3).

that Respondent had pleaded that made dismissal improper on a motion to dismiss under Rule 12(b)(6).

In this case, it may be that after discovery it becomes clear (on a motion for summary judgment) that there is no question of fact and the District Court may then rule as a matter of law. It may also turn out after discovery that there are questions of fact outside the letter that bear on whether the letter is deceptive and misleading, and a jury will have to decide those fact questions. In any event, the disclaimer alone is not and cannot be dispositive on a motion to dismiss under Rule 12(b)(6) given the facts pleaded in the Respondent's complaint.

How important are these legal issues that the Fifth Circuit has decided? The Petitioners would have this Court believe that the sky in the collection industry is falling. Has the collection industry ground to a sudden halt in the wake of the Fifth Circuit's decision in the *Gonzalez*? No. Has there been a wave of bankruptcy filings by law firms engaged in the collection of consumer debts? No. Have collection agencies and collection attorneys stopped sending collection letters to consumers altogether? No. Collection agencies and collection attorneys march on, as before, now with even more instruction from the Fifth Circuit to do as the FDCPA has always commanded them -- to collect consumer debt without the use of abusive debt collection practices such as the use of false, deceptive, or misleading representations and means in the collection of the debt. The Fifth Circuit has been quite specific in what this means in the context of this case:

> For attorneys who choose to collect consumer debts, they must provide a clear, prominent and conspicuous statement that although the letter is from a lawyer; the lawyer is acting solely as a debt collector and not in the legal capacity when sending the letter. With respect to a collection agency acting solely as a debt collector, not to send any message that a lawyer is involved because this deceptively sends the message that "the price of poker has gone up."[52]

If the law were as Petitioners advocate, a collection agency, acting only as a debt collector with no attorneys employed or associated in any way, could mass mail form collection letters to consumers across the country purporting to be a law firm with a completely different name, and escape liability as long as it placed a disclaimer on the back of the letter stating that no attorney had reviewed the consumer's account. Of course no attorney would have reviewed the account at that time, since there were none! This is the exact situation in the case at hand.

There is no conflict existing among the Circuit Courts of Appeal on application of the "least sophisticated consumer" standard to collection letters to determine whether they are in violation of the FDCPA. Because there is no split among the Circuits on any issue before this Court, this Court should deny the Petition for a Writ of Certiorari.

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[52] *Gonzalez*, 577 F.3d at 607.

CONCLUSION

This Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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